CONTINGENT GIFTS AND INCORPORATION BY REFERENCE.—The courts have had great difficulty in reconciling certain contingent gifts with the statutes requiring wills to be in writing duly executed. At first glance there appears no inconsistency, but in practice troubles accumulate.

Before there were any statutes concerning wills the validity of contingent devises and bequests was admitted; also the validity of a provision the effect of which was to depend on a writing to be drawn later, and even by one other than the testator. Robt. Crody, being about to die, called his friends John and Thomas, saying: "Ye be the men in whom I have great trust, especially that the will which I now declare you will faithfully perform, and therefore (inasmuch as a devise of land would be void for violation of the law of tenures) I now make livery to you of the house in which I now lie and all my land in this town, to hold to you and your heirs, in full confidence that you will make a good estate to my wife Alice for life, then to my daughter Margaret and the heirs of her body, but if she be dead without issue, then to my heirs." And the chancellor decreed accordingly. About 1438, 1 Calendar of Proceedings in Chancery (Hen. VI), xliii. This was a mere trust; but lands being devisable by special custom, a testator devised that on a certain event his executors should sell; and though the lands were not devised, but descended to the heir, all the judges of England in the Exchequer Chamber assembled agreed that the executors might sell, for descent-cast takes away entry on a disseizor, but not powers, conditions, etc. 4 Jenk. Cent. case 75, A. D. 1498. In 1431, Babington, C. J., said: "The nature of a devise where lands are devisable is that one may devise that the land shall be sold by the executors, and this is good, as has been said, and it is marvelous law; but this is the nature of a devise, and devises have been used at all times in this form; and so one may have lawful freehold from another who had nothing, just as one may have fire from flint and yet there is no fire in the flint." *Farington* v. *Darrel,* (1431), Y. B. 9 Hen. 6, 23b. A man devised land to his wife for life, remainder to B in fee, and that the wife might make leases for six years; and a lease made by the wife after she had married again was held good against B. *Harris* v. *Graham,* (1638), 1 Roll Abr. 329. A testator directed his executors to select one of his nephews as his beneficiary, and the chancellor ordered them to do it. *Mosely* v. *Mosely,* (1673), Finch Ch. 53.

In this state of the law it was declared by statute that devises would be void unless in writing signed by the testator, and subscribed in his presence by three credible witnesses. 29 Car. II, c. 3, sec. 5, (1677). Under this statute it was held that a man might by devise charge his land with the payment of his debts, and such charge would include subsequent debts; that he might by devise duly executed charge his land with payment of his legacies, and that such charge bound his land to pay legacies created by a later will not executed in such form as to be valid as a devise of land. *Inchiquin* v. *O'Brien,* (1744), not reported, *Hannis* v. *Packer,* (1752), Ambl. 556.

But when a man later devised his lands to trustees upon trusts to be declared by him by any deed executed by him before his death, the Lord Chancellor Loughborough, on the advice of Wilson and Buller, JJ., held the

trusts declared by such deed were void; because the deed was intended to operate only in conjunction with the previously executed devise, was therefore testamentary in character, and did not comply with the statute prescribing how devises should be executed. *Habergham* v. *Vincent,* (1793), 2 Ves. Jr. 204.

The result of this decision was that a man who had duly executed a devise charging his land with the payment of debts and legacies, could add new charges without any formality at all, by merely contracting debts or declaring legacies by word of mouth only; but he could not do so by a duly executed deed even though he had in his formally executed devise expressly provided for that event. He could by his devise authorize another to do for him after his death what he could not reserve to himself the power to do while he lived. He could not by his devise reserve to himself the power to do that by deed which he could have done by deed without making any devise at all. He could not reserve to himself the power to do by deed what he might authorize another to do without deed. He might by devise charge his land with specialty debts which would include those incurred afterwards; but he could not by devise charge his lands with such sums as he should by deed later specify even though the later charges turned out to be only these very debts. He might by devise charge his land with a legacy of £100 to each servant in his employ at the time of his death; but he could not charge his land by devise with £100 to such of his servants at his death as he should by deed specify. But he could do that very thing by charging his land by devise with payment of his specialty debts, and later giving to such of his servants as he pleased a bond for £100 payable at his death, if they should then be in his employ. It is submitted that the decision cannot possibly be reconciled with the accepted law of that day; and that the difficulties of the courts in endeavoring to follow that decision since are due to that fact.

The logic on which the court proceeded in *Habergham* v. *Vincent* sounds very plausible. It was said that the testator cannot reserve to himself the power to devise his property in a manner which the statute declares to be void; and that he cannot by his devise which does not take effect till he is dead give himself a power to arise before the instrument creating it becomes operative. The difficulty with this logic is that it assumes that he is attempting to do so, that the result can be reached in no other way, that a devise which is duly executed cannot deal with future events—a thing that is permitted in all dispositions by will. It is not confined to contingent devises and bequests. A devise to my brother Thomas, although on its face absolute, is contingent on Thomas surviving me. A devise of Blackacre is contingent on not disposing of the land before death. If I bequeath my bonds to A and my bank deposits to B, I may at will, without any legal formality at all, vary, revoke, and renew these bequests as many times as I please. All I need do is to sell a bond and deposit the proceeds, buy a bond and draw a check on the account for the amount. These propositions have never been doubted in any court. Devising my lands to such uses as I shall hereafter by deed declare is not in substance distinguishable from a devise

to my executors to pay my debts, or to such wife as shall survive me. It is submitted that the power to make a testamentary instrument at all necessarily includes the power to make the effect of the disposition depend on the contingencies arising between the making of the will and the death of the testator. Inasmuch as the result must depend on the contingencies not mentioned, expressly mentioning the contingencies does not hurt the devise; and as devises have always been sustained in which the testator expressly made the effect depend on contingencies happening between the time he made the devise and his death, it cannot be material that the contingency he mentions is a writing made by him instead of any other act. To hold otherwise is to sustain a disposition expressly made contingent on a future act, and to defeat a disposition made dependent on a future writing, and yet a writing is an act. The distinction requires us to deny effect to a writing made by the testator while alive and give effect against his heir to a similar writing made by another after the testator is dead, if the testator authorized him to make it.

The New York Court of Appeals some years ago held that a power given by will to a daughter to dispose by will, with a gift to her executors if she predecease the testator, entitled the legatees under the daughter's will made after that of the parent to take, though the power to the daughter lapsed by her death before the death of the parent. "While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is possible to see in the will of the father a clear intent to prevent a lapse, and avoid a partial intestacy by carrying over the one-fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed." *Piffard's Estate,* (1888), 111 N. Y. 410. The same court has just followed that decision in *Fowles's Will,* (1918).

If a testator may make the disposition of his property under his will depend on a writing to be made by someone else later and not effective as an appointment under a power, why may he not make the disposition depend on a writing to be made by himself later? J. R. R.

SUBSTITUTIONAL GIFTS TO CLASSES.—In some recent cases we have fresh reminder of the futility of Sir William Grant's distinction between original and substitutional gifts, a rule over which courts have quarreled and disagreed ever since it was promulgated, and which never was applied to the exclusion of anyone without disappointing the wish of the testator. In speaking of this rule in *Re Hickey,* [1917], 1 Ch. D. 601, 604, Neville, J., says: "The alleged principle seems to be that the meaning of the word 'substitute' involves the idea of replacing one thing by another. One cannot 'substitute' something for nothing. The proposition appears to me axiomatic but not very illuminating. If the testator uses the word its meaning must affect the construction of his will; but where the court uses it, it is merely a mode of expressing a view of the construction already formed."

In view of the endless variety of expression and the hopeless confusion